

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL DESERT
ASSOCIATION, et al.,

Case No. 06-523-HO

ORDER

Plaintiffs,

v.

SHIRLEY GAMMON, et al.,

Defendants.

The complaint alleges nine claims under the National Environmental Policy Act (NEPA), the Federal Land Policy and Management Act (FLPMA), the Public Rangelands Improvement Act (PRIA) the Taylor Grazing Act of 1934 (TGA) and the Administrative Procedure Act (APA). The claims arise from the Bureau of Land Management's (BLM) Records of Decision (RODs) adopting the Lakeview Resource Management Plan (Lakeview RMP) and the Beaty Butte Allotment Management Plan (Beaty Butte AMP), and

corresponding environmental impact statements (EISs). Plaintiffs seek declaratory and injunctive relief. Plaintiffs and defendants filed cross motions for summary judgment.

Legal Framework

NEPA and Council on Environmental Quality (CEQ) regulations require that an EIS contain a detailed discussion of adverse impacts of a proposed action, and evaluation of reasonable alternatives. 42 U.S.C. § 4332(2); 40 C.F.R. § 1502.14.

FLPMA requires that the Secretary of Interior take the following actions, among others: prepare and maintain a current inventory of public lands and their resource values; develop, maintain and revise land use plans "which provide by tracts or areas for the use of the public lands . . . regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses[;]" "use and observe the principles of multiple use and sustained yield" in the development and revision of land use plans; "rely, to the extent it is available, on the inventory of the public lands, their resources, and other values . . ." in the development and revision of land use plans; "manage the public lands under principles of multiple use and sustained yield, in accordance with land use plans[;]" and "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1711(a); 43 U.S.C. § 1712(a), (c)(1) & (4); 43 U.S.C. § 1732(a) &

(b) .

FLPMA also required the Secretary, by 1991, to review all roadless areas of 5,000 acres or more on public lands identified during the inventory as having wilderness characteristics described in the Wilderness Act of 1964 (wilderness study areas (WSAs)), and "from time to time report to the President [a] recommendation as to the suitability or unsuitability of each such area . . . for preservation as wilderness . . ." 43 U.S.C. § 1782(a) .

The PRIA requires that the Secretary, as part of the FLMPA inventory process, "develop (where necessary) and maintain on a continuing basis thereafter, an inventory of range conditions and record of trends of range conditions," and "categorize or identify such lands on the basis of the range conditions and trends thereof as [the Secretary] deem[s] appropriate." 43 U.S.C. § 1903(a) .

The TGA authorizes the Secretary, in his discretion, to establish and modify the boundaries of grazing districts, of certain lands which in the opinion of the Secretary are "chiefly valuable" for grazing or raising forage crops. 43 U.S.C. § 315. The TGA further authorizes the Secretary, in his discretion, to examine or classify certain lands within a grazing district

which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under

this subchapter or proper for acquisition in satisfaction of any outstanding lieu, exchange or script¹ rights or land grant . . .

43 U.S.C. § 315f.

The classification of public lands is subject to review in the land use planning process set forth in FLPMA, and the Secretary may modify or terminate land classifications consistent with land use plans. 43 U.S.C. § 1712(d).

"[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. Agency action includes "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13). A reviewing court shall compel agency action unlawfully withheld or unreasonably delayed, and hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706.

Factual Background

The November 2003 Lakeview RMP and ROD provides overall management direction of all resources on 3.2 million acres of BLM-administered land in Lake and Harney Counties, Oregon, and on 2,172 acres in Northern California and Nevada. Within the

¹"So in original. Probably should be 'scrip'." 43 U.S.C. § 315f, n. 1.

boundaries of the Lakeview Resource Area, the Beaty Butte Allotment covers more than 500,000 acres in Lake County and southwestern Harney County, Oregon. The June 1998 Beaty Butte AMP provides a rest-rotation grazing system as a means of managing livestock distribution and use within the allotment, while protecting other resource values. Tab 1-17 (Beaty Butte AMP abstract).

In April 2005, plaintiff Oregon Natural Desert Association (ONDA) presented the BLM with an inventory of proposed wilderness areas in the Lakeview Resource Area.

Discussion

The court may direct that summary judgment be granted to either party based upon review of the administrative record. Pit River Tribe v. United States Forest Svc., 469 F.3d 768, 778 (9th Cir. 2006).

I. Bars to Judicial Review

Plaintiffs' eighth, ninth, and "alternative" fifth claims against the Beauty Butte AMP are time-barred. A six year limitations period applies to claims for judicial review of final agency action under the APA. Sierra Club v. Penfold, 857 F.2d 1307, 1315 (9th Cir. 1988); 28 U.S.C. § 2401(a). A right of action accrues when an agency action becomes final. Police Automatic Weapons Svcs., Inc. v. Benson, 837 F. Supp. 1070, 1074 (D. Or. 1993). The Beaty Butte AMP ROD became final on April 12,

1999, when the ALJ denied the request for stay. 43 C.F.R. § 4.21(c). Plaintiffs commenced this action on April 19, 2006, outside the limitations period. Plaintiffs ask the court to toll the limitations period because the Department of Interior delayed processing plaintiffs' administrative appeal, the BLM continues to violate law, and the ruling on plaintiffs' administrative appeal constitutes an "overt act" within the limitations period. These savings devices or doctrines are inapplicable in the circumstances of this case. Administrative delays did not impede plaintiffs' ability to timely file an action for district court review. Idaho Watersheds Project v. Hahn, 307 F.3d 815, 825 (9th Cir. 2002).

Because claims against the site-specific Beaty Butte AMP ROD are time-barred, grazing-related claims against the Lakeview RMP ROD under FLPMA, PRIA and TGA are unripe. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 733 (1988); Wilderness Society v. Thomas, 188 F.3d 1130, 1133 (9th Cir. 1999). Unripe claims include plaintiffs' second, fifth and sixth claims, and the portion of plaintiffs' seventh claim that involves land allocated to grazing.

Congress did not impose requirements for timing, methodology or content of the Secretary's inventory of lands, resource values, trends and conditions. Nor did Congress specify how the Secretary should manage lands and prepare resource plans under

principles of multiple use and sustained yield, and prevent undue and unnecessary degradation of lands. Rather, Congress conferred broad discretion upon the Secretary to determine how best to achieve these mandates. Similarly, Congress authorized, but did not require, the Secretary to reclassify lands. Because the Secretary has broad discretion over such matters, claims that the Secretary failed to prepare and maintain current inventories, prepare land use plans and manage lands under principles of multiple use and sustained yield, prevent undue and unnecessary degradation of lands, and reclassify lands, are not susceptible to judicial enforcement. See Norton v. Southern Utah Wilderness Alliance (SUWA), 542 U.S. 55, 66 (2004); see also ONDA v. Rasmussen, 451 F. Supp. 2d 1202, 1215 (D. Or. 2006). Plaintiffs' second, fifth, sixth, seventh and ninth claims for violations of FLPMA, PRIA and TGA are not reviewable.

II. NEPA Claims

A. First Claim

Plaintiffs allege that the BLM refused to take a hard look at the environmental consequences and cumulative impacts of the Lakeview RMP on wilderness values, and refused to consider significant new circumstances and information regarding the wilderness resource and whether decades-old wilderness inventory information is inaccurate. Complaint, ¶¶ 76-79. Plaintiffs argue that the BLM failed to consider impacts of the Lakeview RMP

on wilderness values outside of existing WSAs and 3,139 acres acquired by the BLM in 1992, for which the BLM prepared a wilderness inventory according to its protocols.

BLM published a final EIS for wilderness recommendations in 1989. Tab 6-239. The BLM based its recommendations on 1980 reports of a wilderness inventory that commenced in 1978, and on subsequent wilderness "reviews." Tab 6-256. The BLM also prepared "wilderness inventory evaluations" for four parcels of land acquired after the original wilderness inventory. Tabs 2-14-17.

Because land and resource inventories do not change the management or use of public lands, 43 U.S.C. § 1711(a), and the BLM has discretion as to how to meet its continuing inventory obligations and whether to reclassify lands, the BLM did not violate NEPA by issuing the Lakeview RMP without updating its land and resource inventories "on more than 2.7 million acres of public land outside of existing WSAs"² in the manner preferred by plaintiffs. See ONDA v. BLM, 03-1017-JE, 2005 WL 711663, *4 (D. Or.); but see Rasmussen, 451 F. Supp. 2d at 1213 (finding NEPA violation for failure to update wilderness inventory in case challenging site-specific action).

Plaintiffs' briefing does not address a claim that the BLM violated NEPA by failing to prepare a supplemental NEPA document

²Pls' Memo. at 27.

in response to ONDA's 2005 wilderness inventory. To the extent the first claim for relief may state such a claim, the court finds the claim abandoned, and without merit. The BLM considered ONDA's post-decision wilderness inventory and found no areas where all of the wilderness criteria are met. ECF/CM [#78] (ex. 3, part 1 at 20). The court is deferential to the BLM's findings regarding wilderness criteria.

B. Third Claim

Plaintiffs allege that the BLM failed to consider a reasonable range of alternative grazing allocations and forage levels in the RMP planning area. An EIS must include reasonable alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14. Having previously exercised the discretion conferred by Congress to determine that lands are chiefly valuable for grazing, the Secretary did not violate NEPA by failing to consider (other than alternative E) alternatives that would reallocate these lands to other uses for the duration of the RMP.³ The decision to regulate grazing by authorization, rather than allocation, is reasonable considering the stated purpose and need of the RMP/EIS to provide a comprehensive framework for managing public land in the planning area, and to meet FLPMA's mandate that public land be managed for

³Alternative E would eliminate livestock grazing. Tab 2-26, EIS 3-38.

multiple use and sustained yield. Tab 2-26, EIS at 1-1.

Nor do plaintiffs demonstrate that the range of alternative forage levels considered by the BLM is unreasonable.

Alternatives A & D provide for 108,234 animal unit months (AUM) average licensed use with 164,128 AUM full permitted use.

Alternative B provides for 180,541 AUM full permitted use.

Alternative C provides for 86,587 AUM full permitted use.

Alternative E excludes all grazing. Tab 2-26, EIS 3-39-40.

Plaintiffs first note that two alternatives would lower the current full permitted use level. Plaintiffs cite to no authority that the range of alternatives is unreasonable for this reason, however. Next, plaintiffs argue that the range of alternatives is unreasonable because the BLM cannot adjust use levels through AMPs, rangeland health assessments, permits, or other planning documents. Plaintiffs rely on 43 C.F.R. § 4100.0-8, which states that "[l]and use plans shall establish allowable resource uses, related levels of production or use to be maintained, [and] areas of use" Plans also set forth "program constraints and general management practices needed to achieve management objectives." Id.

The regulation applies to plans, not EISs. The plan sets forth an allowable use (grazing), levels of use to be maintained (108,234 AUM average licensed use or 164,128 AUM full permitted use), and areas allocated to grazing. Full permitted use levels

may change through assessments of individual allotments. Tab 2-26, EIS 3-38. As plaintiffs read 43 C.F.R. § 4100.0-8, the BLM is required to choose and maintain a single forage level for the next twenty years, and ensure that the chosen level of forage is actually consumed. The court finds that Section 4100.0-8 does not prohibit the BLM's flexible approach.

Next, plaintiffs write, "the amount of forage allocated to domestic livestock grazing remains the same under the Lakeview RMP as under the decades-old land use plans it replaces," which the BLM acknowledged were weak and obsolete. Pls' Memo. at 37. The complaint that the BLM selected the wrong forage level has little relevance to the adequacy of the range of alternatives considered.

Next, plaintiffs fault the BLM for deferring forage level decisions to the AMP process, because the BLM has prepared only 20 AMPs for 122 allotments in the Lakeview District, and the BLM may never complete additional AMPs. The BLM considered four full permitted use levels in the EIS for analytical purposes, and chose one full permitted use level for inclusion in the RMP. Tab 2-26, EIS at 3-38-40; Tab 2-33, RMP at 52. The BLM further provided in the EIS and RMP that it will maintain that grazing level until evaluation or monitoring data or rangeland health assessments identify a need for adjustments to meet management objections. Tab 2-26, EIS 3-38; Tab 2-33, RMP at 52. AMPs are

not the only relevant documents. Others include agreements, decisions, terms and conditions of grazing use authorizations, rangeland health assessments, grazing management guidelines, allotment evaluations, watershed analyses, biological opinions, and revisions. Tab 2-26, EIS 3-38; Tab 2-33, RMP at 52. The BLM's flexible approach to grazing management is appropriate considering the vast size of the planning area and the duration of the RMP.

Finally, plaintiffs argue that because FLPMA directs the BLM to manage for multiple use and sustained yield, and to prevent unnecessary or undue degradation and permanent impairment to the public lands, "it necessarily follows that a 'hard look' at reasonable alternatives in the RMP NEPA process should include at least . . . some alternatives that would reduce forage allocated to domestic livestock." Pls' Brief at 39. As noted, two of the four full permitted use levels were reduced from the present full permitted use level - zero, and 86,587 AUM. Plaintiffs seem to complain that the BLM should have considered additional alternative grazing levels. Plaintiffs do not explain what additional grazing levels, or what number of additional grazing levels, would comprise a reasonable range of alternatives. The court finds no NEPA violation arising from the range of grazing levels considered by the BLM.

C. Fourth Claim

Plaintiffs argue that the BLM failed to consider a reasonable range of alternatives in the Lakeview RMP/EIS with respect to areas closed to OHV use. Plaintiffs complain that the BLM did not consider closing existing routes within existing WSAs, or closing "ways" on additional non-WSA roadless areas with wilderness values identified by plaintiffs in their wilderness inventory. The wilderness inventory post-dates the EIS by approximately two years, and the inventory would not have been binding on the BLM in any event. Plaintiffs may be correct that the alternatives consider closing only .3%, .6% and 1.3% of the planning area to OHV use. However, the BLM also considered a variety of OHV use restrictions, including limitations to use on designated or existing roads and trails in different areas. Tab 2-26, EIS 4-129, Table 4-5. These limitations are set forth in detail, with map references, at Tab 2-26, RMP EIS 3-99-101. Considering the vast size of the planning area and the variety of competing uses for various locations within the planning area, the court cannot say from plaintiffs' untimely wilderness inventory that the range of alternatives with respect to OHV use is unreasonable. The court defers to the expertise of the BLM. See ONDA v. BLM, Civ. No. 03-1017-JE, 2005 WL 711663, *3 (D. Or.); ONDA v. Shuford, Civ. No. 06-242-AA, 2007 WL 1695162 (D. Or.).

Plaintiffs claims are time-barred, nonjusticiable, or

amenable to summary judgment on the merits in favor of defendants.

Conclusion

Based on the foregoing, plaintiffs' motion for summary judgment [#28] is denied; defendants' cross motion for summary judgment [#44] is granted. This action is dismissed.

IT IS SO ORDERED.

DATED this 28th day of June, 2007.

s/ Michael R. Hogan
United States District Judge